1. Introduction

The purpose of this article is to point out a few cliches of public policies among approximation in law and political science, in order to reach a better understanding of government action. In this sense, the research problem is: how do we study public policies in such a way that their legal aspects are emphasized without being legalistic?

The research methodology is qualitative, with a descriptive research through documentary revision and analysis on secondary sources (books, articles, and web documents) as well as primary (judgments and legislation). The work hypothesis is that there are at least four controversial or meeting points between public policies studies and law.

First of all, we have the human rights approach of public policies. In this perspective, there is a concern for making the rights and freedoms in legislation, especially in international pacts and treaties on human rights, and the Constitution. Vindication of collective minority groups and traditionally abandoned or discriminated groups has led to an increasing institutionalization or legal formalization of their rights. However, people are also increasingly conscious that legal recognition is not enough to guarantee these rights. This is why topics such as development and governability through design, formulation, execution, and evaluation processes of public policies must be included in this perspective.

Secondly, there’s the topic of judicial review and public policies. The issue consists on the assessment given to a public policy from the legal
perspective, which means that when politics is set aside from law in such a
way that public decisions or programs could be trespassing the principle of
legality and affecting rule of law. In this way, constitutional review of public
policies is a sort of dispute between the legal provisions, its principles,
values, and rights (equality, legality, justice, freedom, publicity, etc.) and
the specific content of public action programs guided by political dynamics
and administrative rationality.

Thirdly comes the issue of “rule of judges” and the guarantee of rights through
constitutional actions. The new safeguard framework of the constitutional
state and protection of fundamental rights through constitutional actions
and judicial decisions leads judges to become unprecedented protagonists.
This has consequences in the formulation, execution, and control of public
policies, as in the actor’s framework analysis.

Finally, there’s the subject of public policy as a legal provision and its role
in legal management. From the legal discipline, there appears to exist a
tendency to identifying policies as guidelines, a legal provision between
principles and regulations. Thus, public policies can be understood
as government action programs that intend to make a reality the rights
established in constitutional principles and values, and that are legitimized
through guidelines.

2. The human rights perspective: need for public policies

The human rights perspective is a new way of thinking and designing
public policies to achieve human development within the conciliation
process between State and civil society. The core of this standpoint is the
incorporation of the principles of interdependence and integrity of human
rights in socio-legal doctrine: “Liberals who are truly committed to the
protection of freedom rights must recognize social rights as preconditions
to the exercise of all rights. This is why today, instead of fundamental rights
and social rights we speak of constitutional fundamental rights” (García,
2012: 143). This means that some rights depend on others, and breach
of such right affects the other one it is related to, and the realization of
a certain right is associated to the satisfaction of another, and so on
(Jiménez, 2007).

This leads us to another characteristic of the human rights perspective,
which is the concern for the materialization, realization, or guarantee of
rights and freedoms established in legal precepts.

On the other hand, it is important to differentiate in the human rights
standpoint the contrast between human rights as a result-END, meaning,
as an aspiration (objective) and demand (subjective) to achieve or obtain
the protected legal right, and the human rights Perspective, which is the
process-MEANS, as a standpoint and way of achieving the realization of these rights. Some of the elements of this perspective are:

- Transversality of human rights in all spheres of State and society (Bernales Ballesteros, 2004).
- Principles of no discrimination and inclusion for universality.
- Human dignity principle. Not so much emphasis on social structures, but on people and their relations (Guendel, 2002).
- Democracy principle. Active, informed, and leading participation in all decision-making processes.
- Co-responsibility of all actors, differentiating “rights-bearing subjects” from “obligation-bearing subjects”, which are both complementary.
- Predominance of the public sphere, of democratic deliberation, and pacific conflict solution.
- Priority of local levels in the exercise and realization of rights, since actions are directed towards making them effective and turning them into a reality (Tejada Pardo, 2004).

One of the consequences of the human rights perspective is the great importance given to public privacies as an ideal means towards materialization of rights. Public policies have a central role in human rights processes. Indeed, the growing institutionalization of societies has evolved towards a certain type of formulae that translate human rights vindications, beyond their legal recognition, to a full existence through government actions. To this purpose, Calvo García recalls with regard to possibilities of a useful or regulatory right: “… realization of a useful or regulative right is only possible as to the terms of execution of public policies, designed to achieve results according to values, objectives, and social interests. (2005: 11; underlining added).

One must remember that most public policies were a response to demands concerning economic and social rights (promotional rights)$^2$, which are the rights that make possible the realization of other rights, such as civil and political. This is why attention on public policy spheres by human rights promoters is barely obvious and necessary.

The reach of the interpretation of human rights, from which two different tendencies can be identified, has led the legal debate:

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$^2$ The breeding ground for studying public policies was the execution of massive social and economic programs during the second post-war that tried to reconstruct, reactivate economy, and making ESCR a reality, with a significant participation of the State and the will to forge the associates’ welfare. The Welfare State was the scenery that made possible the appearance of most public policies, that did not properly exist until then (Meny y Thoenig, 1992).
a) The first believes human rights must be interpreted according to the historical context, the will of those who wrote the Constitution; this is why these rights would only be for defense (civil and political rights).

b) Another one believes that fundamental rights must ensure a minimum welfare standard, due to the changes of industrial society. This means that both defense and benefit rights must be included (civil, political, economic, and social rights).

The last interpretation is coherent with a rights perspective and the Constitutional Court rulings have linked both tendencies by protecting benefit rights through relation or constitutionality block. In any case, the concern for the materialization of such rights is evident: “The issue of the proper interpretation of Fundamental Rights is related to the philosophical debate on text interpretation and the justification of legal judgements that are necessary in the concretion process of these dispositions…” (Arango, 2005, p. 37; underlining added).

Studies on human rights perspective and public policies reach the following conclusion: human rights are the ethical foundation of formulation and execution of public policies. This means that human rights are the object of public policies, since their goal is the concretion, protection, or defense of situations that are socially relevant and involve violation or infringement of human rights (Garretón, 2004; Bucci, 2002, Bernales Ballesteros, 2004).

This is also tangible in legal studies and researches in which the need to study public policies is increasing, since it is through public service provision and execution of intervention and public regulation programs that rights are materialized, not so much by only regulating or adopting a legal provision that can eventually be vacuous, as it has happened.

3. Public policies and legal precept: judicial review

At this point we can find the relation between power and law and their mutual co-relations. Perhaps Bobbio (1985) has presented one of the best approaches when pointing out that law is turned into a de-facto relation in a relation that generates rights and obligations; meaning, he makes of command a right and of obedience a duty, thus legitimizing political power. In theory of law and political theory there is an agreement in stating that politics determines law, however, this doesn’t mean that the ruler or civil servant can modify law whenever they want, since this is one of the main characteristics of rule of law: once a legal precept is established, the ruler must yield to it while it is applicable. In the meanwhile, the law acquires autonomy and independence from politics and is turned into a limit of public powers and authorities’ actions. This is why public servants are set apart from common citizens: citizens can do anything the law does not ban, while the others can only do what law permits.
Mechanisms that guarantee the submission of the decisions of public servants to the legal framework are different forms of control, such as disciplinary, administrative, and judicial review. The adoption of social State and constitutionalization of law has reinforced constitutional control of judges and courts on existing legal precepts made either by the Legislative or Executive Branch.

The second half of the 20th Century witnessed an extraordinary development of constitutional law, especially because the Second World War catastrophe and the actions of Nazis, who would took shelter on a presumed legality, which led to mistrust or devaluate parliaments and governments that can eventually threaten human rights. This is how the constitutional State is born, whose features are, _grosso modo_, the following:

a) Adoption of rigid constitutions, of difficult modification;
b) Constitutional supremacy and fundamental rights;
c) Direct enforcement of constitutional precepts;
d) Establishment of a constitutional court as guardians of the constitution that faces harassment of legislative and executive branches;
e) Modification of the sources of law system and power re-balancing (a significant importance was given to jurisprudence\(^3\) and the judicial branch);

The binding force of constitutional courts' rulings and doctrine in their control and right protection task, of both their judgments (arguments and interpretations), and resolutions (decisions);
g) Legal pluralism when applying extra-systematic interpretation principle criteria, values, and constitutional rules (neoconstitutionalism). One of the consequences is an increase of the participation of judges and courts, since their rulings transcend to political and economic spheres, giving a renewed value to jurisprudence as a source of law.

Public policies are no exception, since they are expressed or manifest themselves through laws, acts, or other kinds of regulations that are maintained throughout the process; in this sense, the scope of policies appears to find its limits in principles, values, and fundamental rights established in the constitution or international treaties that belong to the constitutional block. Judges value the policies' contents within the essential core of constitutional fundamental rights: in this process, the interpretation of the extent of constitutional previsions facing public policies is of the most importance when constitutional control is performed. This is the reason why it is common that some policies are seen suspiciously when they contradict superior laws and become mere instruments of consolidation and defense of group interests. But in these cases, judicial review as well as other controls (such as political and that of citizens) can solve the situation.

Up to which point do legislative and executive authorities have limits in constitutional principles and values? How are public policy-related decisions affected by judicial review? It is evident that a fundamental

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\(^3\) TN: Jurisprudence as in the course of court decisions, not as in the study of the law.
right set limits to conducts of both authorities and individuals, and in this sense any legal precept or conduct contrary to these rights shall be void and generate responsibility for damages. However, in the case of public policies, one must bear in mind that these are much more than legal precepts and public servants’ actions, especially if we consider them as a result of the political game of different actors with their own interests and ideas in search for solutions, answers or treating situations that are considered of public interest.

This circumstance makes judicial review, especially constitutional and legality controls, more diffuse and indirect on public policies. Because of interaction and the democratic game, public policies can be situated on the beginning of the chain and modify law in order to achieve objectives that have been politically agreed. Politics determines law, this is true, but in the constitutional State there is a core of rights and principles with reinforced protection that every public policy must recognize, unless that a huge political movement the Constitution is changed as well as its principles.

In order to give an example, the Constitutional Court of Colombia, with the Sentence C- 609 de 1996, M.P. Alejandro Martínez y Fabio Morón Díaz, established which are the limits of the legislative branch when facing constitutional fundamental rights in the context of criminal law:

Thus, there has been a constitutionalization of criminal law, since in both substantive and procedimental matters, the Chart incorporates precepts and enunciates values and postulates –particularly in the field of fundamental rights- that affect criminal law in a significant way, as well as guide and determine its reach. This means that the Legislator does not have absolute discretion to define crimes and criminal procedures, since he or her must abide constitutional rights since they represent the foundation and limit of the State’s punitive power (underlining added).

And as to criminal policy, it indicated the politic activity’s discretion to set it through a democratic process, and its content:

The latter does not mean that the Constitution has once and for all defined criminal law, since the Legislator has, within the limits set by the Chart, a relatively autonomous scope, characterized by values, assumptions, and purposes of its own. Thus, through the democratic process of law enactment, the State creates crimes and sets its punishments (principle of legality of penalties), and can modify the procedure. It is in this historical work that it takes in and gives up different and successive punitive philosophies that can be more or less drastic, according to what the Legislator considers politically necessary and convenient. To this end, therefore, and under certain limits, it is possible to see different developments of criminal policies and criminal proceedings. (Underlining added).
4. Rule of judges: guarantee of rights through constitutional actions

As previously mentioned, the exchange of sources of law gives binding force to the constitutional court’s and judge’s jurisprudence; this modifies the balance of powers, especially the High Court’s role, that become active organs that work with legislative and executive branches in the formulation and evaluation of public policies.

The rulings that are pronounced when constitutional control is carried out, especially those concerning writs and other constitutional actions such as popular actions and writ of mandamus, have catapulted judges because of the impact of their rulings in the legal, economic, social, and political framework. Thus, when judicial officials safeguard fundamental rights, they become more than mere veto actors: they become genuine policy makers.

There seems to be no other way, since when resolving writs (regarding fundamental rights) or group actions (regarding collective rights), judges must analyze the concrete controversial situation faced to constitutional precepts (principles and values) and pass a sentence on the public action to affect it, to remedy or emend it in order to either restore a fundamental or collective right that has been lessened, or to prevent and arrest damages.

The latter has caused that rulings include public policy guidelines, that in a traditional harmonic division of powers would concern the legislative or executive branch, but given the fact that there is a fundamental right involved, the matter concerns the judiciary as well. There are several clear examples in Colombia, such as the case of the attention to displaced people policy, and the prison policy, cases in which the Constitution Court has declared a “state of unconstitutional affairs”, and through several sentences and decrees it has defined policy guidelines and administrative action programs, since according to the Court: “In a Social Rule of Law, authorities must mend social inequalities, facilitate the participation of weak and vulnerable sectors, and stimulate a progressive improvement of material conditions of existence of the most depressed sectors of the population” (Sentence 251 de 1997, M.P. Alejandro Martínez).

In other cases, the court has exhorted the Congress to issue or modify laws that are necessary for the development of public policies and the guarantee of fundamental rights, and there is also a well-known case of a lower court in which authorities of several territorial levels were ordered to set forward coordinated actions to take care of the Bogota River’s pollution.

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4 The “State of unconstitutional affairs” doctrine was created by the Constitutional Court, and therefore is a contribution of Colombian law to the world; this standpoint is created in 1997 as a judicial response to reduce the breach between constitutional rights and the reality of a country characterized by inequality, exclusion and violation of human rights. See García (2012).
Furthermore, we must consider that these sentences' effects have extended beyond the parties (inter partes) towards a broader set of affected people. In the case of writs resolutions on state of unconstitutional affairs, the effects are applied to anyone that finds himself or herself in the same situation, even though they haven't interposed the writ, in order to guarantee their right to an equal treatment. This is the reason why the resolution effects end up involving a large number of people, and affecting the reformulation of public plans and programs of prevention, attention, and reparation, according to each case.

Therefore, there is a phenomenon from which we ask ourselves: Is it a tendency to judicialise politics, or is it a phenomenon of politicization of justice? The answer, according to what has been analyzed and the changes in law, is that there is a judicialization of public policies, since they cannot contradict constitutional principles and fundamental rights, and also since judicial rulings will inevitably “spatter” other spheres that are not strictly legal, such as economy or policies, since the protection and effective guarantee of rights is not exhausted by the law.

As to politicization of judges and justice, it seems to be a highly ironic statement that also denotes incomprehension. If it means matters that traditionally belong to politics (Congress and Executive Branch) are decided now through rulings, there is no doubt that judges must decide on social and economic affairs within the legal interpretation of fundamental rights and appreciation of the facts. Faced with this reality, the Constitutional Court has been criticized since it is legislating and co-governing, and there are some who propose to limit their competence; some say that because magistrates are not publicly elected, they have no politic or popular legitimacy to contradict the legislative or executive’s decisions. However, one must bear in mind that in contemporary democracies, in is not about assuring the majority’s popular will, but also about protecting rights and freedoms, even from the vicissitudes of electoral politics and must be put in charge of an autonomous and independent judiciary:

The very purpose of a Declaration of Rights was to withdraw certain topics from the vicissitudes of political controversy in order for them to be unreachable by majorities and officials, and establish them as legal principles to be enforced by the courts. The right to life, freedom and property, freedom of expression, of the press, of religion and association, and other fundamental rights must not be submitted to voting: they don’t depend on the result of an election (Robert Jackson, cited by García, 2012: 151).

However, if it means that judges’ rulings are not based on legal considerations, then there is a negative politicization of the judiciary. Nevertheless, there have been judicial rulings such as these before, and it is not enough to talk of a “rule of judges” or “politicization of justice” the way it is being done today.
Faced to the role of high courts and judges in public policy processes, we can identify three different positions of debate (García, 2012):

a) One that opposes to courts designing public policies, stealthily bearing in mind the classic separation of powers.
b) Another position considers that courts have different degrees of participation in the design of public policies.
c) A third one limits the interference of courts in aspects that are not economic, since judges have no technical knowledge on these matters and can eventually affect fiscal balance.

Finally, there’s matter of the relation between the legal framework and political decisions. The problem lays on the political tendency of modifying the legal framework to solve social or economic issues (legal fetishism); in this way, a legal-reform public policy has been established, one that wishes to solve everything through legal reforms; it is easy to believe that legislation solves everything, and it is seen by public opinion as a great achievement, issuing a law or act, as if this would solve the problem. The limitations of this orientation are well known; they mix up public policies with legal precepts. However, public policies are made out of several resources (the law is one of them), a variety of actors and interests, distinct ideas and different institutions are involved.

The recent debate on reformism has dealt with to positions or rationalities: neoliberalism against constitutionalism. The first has an economistic view y promotes principle of balance and fiscal rule in State action, and is mainly promoted by measures of the Congress and Government; the second, in agreement with the theory of garantism and principlism, focuses its attention on the enjoyment of fundamental rights, and is promoted by the Constitutional Court and judges. In the first case one could see the “reason of State” and in the second the “public reason” proposed by Roth (2006) in his research on human rights public policies in Colombia. The questions to be answered are the following: Up to which point are judges and their rulings overflowing the State’s financial capacity? Are globalization and neoliberalism contrary to the materialization of the fundamental rights enshrined in the Constitution? Is a Social Rule of Law possible if based on the guarantee of fundamental rights? (Ramírez, 2012).

5. Public policy, legal norm and legal management

5.1. Public policies as guidelines

One of the basic elements of public policies is their normative character (Mèny y Thoenig, 1992). This normative character of policies generates the coercive element that has lead to formulating a policy typology according their degree of compulsion (Lowi, 1964). Public action is framed
inside a Rule of Law in which social life is “juridified” by the adoption of a Constitution that limits public power and submits authorities to the rule of law; by giving itself a charter on civil rights and freedoms; and by developing a legal framework made out of legal precepts (laws, decrees, resolutions, international treaties, etc.) that are coherent, harmonious, and hierarchical, that constitute a unitary system.

This legal framework is the manifestation of Law, which is fulfilled by legal norms, which are differentiated from simple norms that contain a conduct imperative that must be observed under pain of a punishment, guaranteed by the possible use of coercion. The legal norm is a set of enunciation or propositions that prescribe or prohibit conducts, that grant rights and create obligations, and whose obligations are imposed on its recipients; among its characteristics, norms are abstract, general, and imperative.

With the Social Rule of Law, intervention, and welfare, public action became merely regulative towards a more dynamic function, of provision and execution of public goods and services. Law changed from a merely declarative function (fundamental rights) to a promoting one (promotional rights), in which the law is used as a means, in order to achieve certain goals and enriched by material criteria (economic, political, axiological, ethnical, technical, etc.).

The first change provoked by this regulative law would have to do with the use of law as a means to the execution of policies—interventionist-oriented to promote social goals, values, and interests. Secondly, as a consequence of this interventionism and the resulting “materialization” of rights, an increase of its structure and content complexity is produced, as well as of the legal dynamics through which they are carried out (Calvo García, 2005:10; underlining added).

In this context, legal norms that had been traditionally classified in two kinds (principles and rules), has now been complemented by others: values and guidelines. As for principles, this have gained importance because of constitutional review where they are used abundantly to solve difficult and complex controversies; principles can be considered as ample precepts that regulate general properties cases; norms that express superior values (this is why they are based on extra-legal criteria such as philosophy, politics or ethics); as programmatic norms to pursue certain ends, and as general statements that allow the systematization of the legal framework. Just as rules, they hold an imperative and enforceable mandate, and are of directly applicable (Quinche, 2010, p. 45). An example of this is the presumption of good faith or abuse of rights principles. As to rules, these are norms that establish guidelines or behavior criteria and demand their fulfillment; however, they are characterized by containing a closed or concrete factual supposition or conduct, this means that they are composed by a legal fact and a concrete legal consequence, such as
criminalized actions established in penal codes. Concerning values, these are linked to principles and are not rules that establish a binding obligation or a direct application to solve a specific matter; they are statements whose utility is of cardinal importance in legal hermeneutics since they are used to solve an interpretation issue in which the sense of the law is in jeopardy. The Colombian Constitutional Court has noted several examples: values of coexistence, labour, justice, equality, freedom, peace, etc., which are found on the preamble, as well as related values to the States ends, such as community service, prosperity, and effectiveness of principles, rights, and duties. As for guidelines, these are intermediate norms found between principles and rules, with a binding and general character, and that are fulfilled through public policies. (See Tables 1 and 2)

### Table 1

**Kinds of legal norms**

<table>
<thead>
<tr>
<th>Principles</th>
<th>Values</th>
<th>Rules</th>
<th>Guidelines</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Highly general norms that contain an optimization or perfectibility mandate to be achieved.</td>
<td>• Norms that do not establish mandatory conducts, since they are not applied to specific cases.</td>
<td>• Norms with a high degree of particularity that are found in the private-options domain.</td>
<td>• Norms that refer to public policies; guidance for the public action.</td>
</tr>
<tr>
<td>• They provide a sense reference to the regulatory system.</td>
<td>• They help to establish the meaning of law, in complicated hermeneutic situations.</td>
<td>• They allow us to structure a life plan.</td>
<td>• They are propositions that describe objectives and goals to be fulfilled (teleological).</td>
</tr>
<tr>
<td>• They are the criteria to comprehend the rest of norms.</td>
<td>• They determine the scope of rules.</td>
<td>• They set conduct provisions.</td>
<td>• They Complement and fill norm spaces between principles and rules.</td>
</tr>
<tr>
<td>• They are propositions that describe and enshrine rights.</td>
<td>• They are subordinate to principles.</td>
<td>• They exhaust themselves.</td>
<td>• They fulfill principles and rules in action plans and programs.</td>
</tr>
<tr>
<td>• They solve hard cases in which the conduct or situation surpass the legal precept.</td>
<td>• They solve easy cases, by applying a precept to the conduct that frames into the syllogism.</td>
<td>• They are subordinate to principles.</td>
<td>• They allow the operationalization of human rights.</td>
</tr>
<tr>
<td>• Any conflict among principles is solved through the weight formula.</td>
<td>• When in conflict with principles, the principle prevails.</td>
<td>• They are usually in hands of the legislative branch.</td>
<td>• When in conflict with rules, usually the guideline prevails.</td>
</tr>
<tr>
<td>• Any conflict between principles and other kinds of norms: the principle prevails.</td>
<td>• They are generally in charge of high court magistrates.</td>
<td>• Examples: codes in general, civil, criminal, commercial, labour, police, disciplinary (this without prejudice that they may contain express principles).</td>
<td>• They are generally in hands of administrative authorities (executive branch).</td>
</tr>
<tr>
<td>• They are generally in charge of high court magistrates.</td>
<td>• Example: Principle of prevalence of fundamental rights; democracy, pluralism, etc.</td>
<td>• Example: Presidential Programme on Human Rights and International Humanitarian Law (2006).</td>
<td></td>
</tr>
</tbody>
</table>
Table 2
Relation between principles and rights

<table>
<thead>
<tr>
<th>PRINCIPLES</th>
<th>RIGHTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freedom</td>
<td>Civil and political rights</td>
</tr>
<tr>
<td>Equality</td>
<td>Economic, social, and cultural rights (ESCR)</td>
</tr>
<tr>
<td>Fraternity</td>
<td>Collective rights (self-determination,</td>
</tr>
<tr>
<td></td>
<td>development, environment, peace)</td>
</tr>
</tbody>
</table>

Source: Adaptation of Tejada Pardo (2004).

It had been said that the useful law (García Calvo, 2005) is a legal system oriented towards the achievement of goals, only possible in terms of implementation of public policies processes; on the other hand, the law is a legal norm (principles, rules, and guidelines), but it is the guidelines that allow the realization of principles and rules. Therefore, guidelines may be understood as public policies. This leads to two requirements:

- Structuring of strategies, plans, and mechanisms, either legal, political, administrative or financial, that allow the transformation of objectives and goals, into public policy formulation, execution, and evaluation processes. This necessarily leads to the topic of governability, which is the capacity to formulate and execute public policies as a response to social needs and demands, given that, as stated before, guidelines are in charge of the executive branch, that is, the Government and its agencies.

- Flexibility of structures, regulations, and procedures of intermediation among the different agencies, and social public and private actors, in order to facilitate the construction of agreements, consensus, and necessary support for public policy processes. In this scenario we find discussions concerning governance.

In conclusion, public policies can be understood as government action programs that seek the concretion of the rights established in constitutional principles, under a human rights perspective and that, according to the legal precept standpoint, are legitimized through guidelines.

This approach has its advantages and disadvantages. Among the positive points are, the possibility to establish higher levels of coercion to their fulfillment, their validity, legitimacy, or effectiveness assessment. However, there are problematic or negative elements such as the risk of reducing public policy to a mere legal precept, common in policy analysis in our area; in this sense, most of the policies are institutionalized through legal precepts (given that this allows authorities to act, allocate budgets and functions, etc.), but this does not mean that public policy is a legal precept: it is but a moment of it, a legal manifestation that is necessary, but not enough.
On the other hand, there is the difficulty of operationalize the concept of “guideline” as a specific kind of intermediate legal norm between principles (and higher values), and rules; this means that we must consider that public policies can contain rules and principles at a time; in other words, the law is not manifested separately through principles, rules, and guidelines, usually a legal text such as a constitution, an international treaty, a law or a decree have both principles and rules. In this sense, it is somewhat absurd to identify guidelines from principles and rules to reach the conclusion that there’s where public policies are, since public policies contain objectives and action guidelines that could be considered as legal principles and rules.

5.2. Public legal management and judicial public policies

Legal management is a relatively new concept that has been introduced since the 1991 constitution, the development of legal garantism, and a greater social interventionism of the State. It is based on two fundamental axis: a) Prevention of unlawful damages, and b) Improvement of the States judicial defense. Legal management is considered a model (MGP), which is defined as: “An instrument of legal management that is characterized by the definition of transversal political frames for all entities and agencies that enforce legal tasks, in order to define strategies…” (Ministry of Interior and Justice, and World Bank, 2010: 249).

The structural elements of MGP are: a) Information systems, b) Legal public policies, and c) The prosecutors of the State (Aviar H., López, D. y Rodríguez, C. (sf); Ministry of Interior and Justice y World Bank, 2010). This model has served as a guide to formulate politics in the sector on the District Capital of Bogota level and on a national level through the Minister of Interior, with the National Agency of Legal Defense of the State.

As to judicial public policies, there is a growing awareness as to relation administrative management aspects with the requirements of justice; in other words, the design and formulation of judicial public policies is an important tool to achieve judicial objectives: “... the creation of offices or legal modifications do not necessarily generate “per se” answers to congestion and quality, it is necessary to analyze the organizational context and relevant flows” (Younes Moreno, et.al., 2006: 31).

The management component means the possibility to plan, organize, control, and guide the legal activities concerning the State’s defense, by

5 In the case of fundamental rights, for example, these have been considered rules when they are not distinguished from other legal precepts and protect certain positions of individuals from the State, and as principles when besides protecting certain positions they are connected to certain ethical, political, or moral values that are essential for functioning (Robert Alexy, cited by Grajales, 2011).
introducing elements of administrative and economic rationality, as well of prevision and damagemitigation. All this structured in action programs or public policies for the judicial sector.

6. Conclusions

From the human rights approach, the study and understanding of public policies has become essential given the emphasis on making rights a reality rather than its positive consecration. This way anyone interested in human rights should be interested in the analysis and policy formulation, since they make rights and freedoms effective. Public policies raison d’être is the materialization of rights, and it is what they should aim for.

Constitutional and legal review is diffuse and indirect when it comes to public policies, since these are the result of the interaction between Democracy and Politics. However, there is a greater interference of the law, especially of fundamental rights that must be kept in mind when elaborating and executing public policies.

The rule of judges cannot be fought in the current design of constitutional state or constitutional justice. This is possible because of constitutional review, especially because of abstract constitutional control (such as the writ of injunction, popular and group actions, writ of mandamus, etc.), whose purpose is the protection of constitutional rights. This is why these court rulings overflow the legal sphere and have an effect on economic, politic, and social spheres that used to belong exclusively to the world of Politics (Congress and Government). This means that public policies have new actors or policy makers that interact with legal instead of political rationality. The argument lays in establishing where do the limits of judges go and up to which point can the State guarantee human rights.

Understanding public policies as legal provisions, guidelines, is more inconvenient tan helpful. Public policy is much more than legal formalization, even though it is partly so. Public policy has also principles and rules, not only guidelines. This is why this proposal would be inapplicable.

Resources


enfoque de los derechos humanos en las políticas públicas, Lima: Comisión Andina de Juristas, pp. 93-109.


Calvo García, Manuel (2005), Transformaciones del Estado y del Derecho, Bogotá: Universidad Externado de Colombia.


